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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 MISCHLENE THOMPSON,

Civil No. 06-690-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 JO ANNE B. BARNHART,
Commissioner of Social Security,

14 Defendant.

15 _____
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25 AIKEN, Judge:

26 Claimant, Mischlene Thompson, brings this action pursuant
27 to the Social Security Act (the Act), 42 U.S.C. § 405(g), to
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1 obtain judicial review of a final decision of the Commissioner.
2 The Commissioner denied plaintiff's application for Disability
3 Insurance Benefits (DIB) under Title II of the Social Security
4 Act, and for Supplemental Security Income (SSI) disability
5 benefits under Title XVI. 42 U.S.C. §§ 405(g), 1383(c)(3). For
6 the reasons set forth below, the Commissioner's decision is
7 reversed and remanded for payment of benefits.

8 **PROCEDURAL BACKGROUND**

9 Plaintiff protectively filed her application for DIB on
10 January 14, 2003. Tr. 22. Her date last insured was December
11 31, 2001. Tr. 81. On June 6, 2005, after a hearing, the
12 Administrative Law Judge (ALJ) found plaintiff disabled for a
13 period of more than 12 months beginning July 1, 1997, through
14 January 31, 2002. Tr. 23. This closed period of disability
15 ended March 21, 2002. Tr. 29. On March 13, 2006, the Appeals
16 Council denied plaintiff's request for review, tr. 8-10, making
17 the ALJ's decision the final agency decision. See 20 C.F.R. §§
18 404.981, 416.1481.

19 **STATEMENT OF THE FACTS**

20 Plaintiff was born May 28, 1969. She alleges disability
21 beginning June 15, 1996, due to ulcerative colitis, fibromyalgia,
22 sciatica, memory loss, migraine headaches, and fatigue. Tr. 22.
23 During the hearing, plaintiff amended her alleged onset date of
24 disability to January 1, 2000. Her last date insured was
25 December 31, 2001. Tr. 58. Plaintiff has a 12th grade education.
26 She has past semi-skilled work experience as a sorter, bagger and
27 assembler. Tr. 132.

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STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d) (1) (A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502, 416.920. First the Secretary determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

In step two the Secretary determines whether the claimant

1 has a "medically severe impairment or combination of
2 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
3 §§ 404.1520(c), 416.920(c). If not, the claimant is not
4 disabled.

5 In step three the Secretary determines whether the
6 impairment meets or equals "one of a number of listed impairments
7 that the Secretary acknowledges are so severe as to preclude
8 substantial gainful activity." Id.; see 20 C.F.R.
9 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
10 presumed disabled; if not, the Secretary proceeds to step four.
11 Yuckert, 482 U.S. at 141.

12 In step four the Secretary determines whether the claimant
13 can still perform "past relevant work." 20 C.F.R.
14 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
15 disabled. If she cannot perform past relevant work, the burden
16 shifts to the Secretary. In step five, the Secretary must
17 establish that the claimant can perform other work. Yuckert, 482
18 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
19 (f). If the Secretary meets this burden and proves that the
20 claimant is able to perform other work which exists in the
21 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
22 416.966.

23 DISCUSSION

24 ALJ's Findings

25 The ALJ relied on the five step sequential analysis as
26 outlined above to determine disability. The ALJ made the
27 following findings: first, plaintiff has not engaged in
28 substantial gainful activity since July 1, 1997. Tr. 28. Second,

1 plaintiff has medically determinable severe impairments of
2 ulcerative colitis, a pulmonary embolism, depression, arthritic
3 changes of the lumbar spine at L5-S1, headaches, and
4 fibromyalgia. Tr. 24. The ALJ also found the plaintiff
5 experienced medical improvement effective January 31, 2002. Tr.
6 25. Third, plaintiff's medically determinable impairment of
7 ulcerative colitis equaled a listed impairment between July 1,
8 1997, and January 31, 2002. The ALJ, however, found that since
9 January 31, 2002, plaintiff's physical impairments do not meet or
10 equal any listing. Id. Fourth, the ALJ found that effective
11 January 31, 2002, plaintiff experienced medical improvement of
12 her disabling impairment related to her ability to work. Tr. 29.
13 Specifically, the ALJ found that plaintiff "had the capacity to
14 return to her past relevant work as a restaurant worker." Tr. 29.
15 The ALJ, therefore, did not consider step 5 since he found that
16 "claimant's disability ceased on January 31, 2002, as a result of
17 medical improvement" and that plaintiff could return to her prior
18 occupation. Id.

19 Plaintiff's Allegations of Error

20 (1) Medical Improvement

21 The ALJ found that plaintiff had medically determinable
22 severe impairments that equaled section 5.06 of Appendix 1,
23 between July 1, 1997, and January 31, 2002. Tr. 24-25. The ALJ,
24 however, also found that plaintiff experienced medical
25 improvement effective January 31, 2002. Tr. 29. The termination
26 of benefits due to medical improvement must rest on evidence that
27 the individual's condition has improved. 20 C.F.R. §§ 404.1594,
28 416.994. While the plaintiff has the burden of showing initial

1 disability, the Agency has the burden of establishing medical
2 improvement. This burden must be met with: (1) substantial
3 evidence based on an affirmative showing of improvement,
4 including changes in symptoms, signs or laboratory findings, and
5 (2) evidence that the improvement results in an increase in
6 functional capacity. Id.

7 Plaintiff's treating physician, Dr. Katja Daoud, evaluated
8 plaintiff and found the necessary positive trigger points for a
9 formal diagnosis of fibromyalgia. Tr. 883. The fibromyalgia
10 diagnosis was affirmed by Dr. Brody and Nurse Practitioner
11 O'Halloran in subsequent evaluations. Tr. 801, 856. The record
12 shows that plaintiff continued to suffer from nausea, vomiting,
13 and chronic diarrhea. Tr. 622, 820, 856, 866, 876, 895.
14 Plaintiff also suffered from continuing pain complaints related
15 to her diagnosis of fibromyalgia. Tr. 715, 796, 801, 805, 807-
16 08, 811-12, 855-56, 862-63, 869, 876, 883-84, 888. I find no
17 evidence that plaintiff's medical condition improved, and that
18 plaintiff had regained the ability to return to work based on
19 that medical improvement.

20 (2) Reliance on medical expert

21 The ALJ relied on the medical expert, Dr. Bigley, to reject
22 the diagnosis of fibromyalgia and to find medical improvement.
23 The ALJ may adopt medical expert testimony when the reasons for
24 doing so are specific and legitimate, based on substantial
25 evidence in the record. Roberts v. Shalala, 66 F.3d 179, 184 (9th
26 Cir. 1995). The ALJ stated: "[T]he medical expert testified none
27 of The claimant's impairments met or equaled any section in
28 Appendix 1." Tr. 25. The medical expert, however, qualified his

1 opinion regarding plaintiff's colitis, her fibromyalgia, and her
2 functional capacity, stating: "I'm not a gastroenterologist
3 . . . I can't tell you what - how many people would come out with
4 this [frequent loose stools]." Tr. 939. When the ALJ pressed
5 for Dr. Bigley's opinion on the disabling effects of plaintiff's
6 fibromyalgia, he reiterated, "I've told you I can't give you an
7 answer." Tr. 941. Finally, the medical expert's opinion on
8 plaintiff's ability to return to work was premised on assuming
9 plaintiff's incredulity. Tr. 943.

10 The reviewing medical expert, who was neither a
11 gastroenterologist nor a rheumatologist, provided a very limited
12 basis for the ALJ to reject the opinions of the treating
13 specialist and three other doctors. The ALJ lacked specific and
14 legitimate reasons based on substantial evidence to adopt the
15 medical expert's testimony. Roberts, 66 F.3d at 184.

16 (3) Plaintiff's fibromyalgia complaint

17 The ALJ rejected the diagnosis of fibromyalgia because Dr.
18 Bigley found the diagnosis to be "both controverted and
19 unsubstantiated by neutral control point testing." The ALJ then
20 found that the fibromyalgia was not a severe impairment at step
21 two by rejecting plaintiff's testimony and rejecting other
22 medical evidence from treating physicians documenting her pain.

23 At step two, plaintiff has the burden to establish a
24 medically severe impairment or combination of impairments. Bowen
25 v. Yuckert, 482 U.S. 137, 140-41 (1987). To satisfy this burden,
26 plaintiff must produce evidence establishing a medically
27 determinable impairment. 42 U.S.C. §§ 43(d)(3), 1382c(a)(3)(D).
28 When a medically determinable impairment exists, the ALJ must

1 then assess whether the impairment is "severe" within the meaning
2 of the regulations. An impairment can only be found not severe
3 where "the evidence establishes a slight abnormality that has no
4 more than a minimal effect on an individual's ability to work."
5 Webb v. Barnhart, 433 F.3d 683, 686 (9th Cir. 2005).

6 The Ninth Circuit has held that fibromyalgia is medically
7 determinable. Benecke v. Barnhart, 379 F.3d 587, 594 (9th Cir.
8 2004). However, there are no clearly established tests for
9 diagnosing this condition. Jordan v. Northrop Grumman Corp.
10 Welfare Benefit Plan, 370 F.3d 869 (9th Cir. 2004). Moreover, the
11 Ninth Circuit has held that requiring objective evidence for
12 fibromyalgia amounts to clear error. Benecke, 379 F.3d at 594
13 ("The ALJ erred by effectively require[ing] 'objective' evidence
14 for a disease that eludes such measurement) (internal quotation
15 marks and citation omitted).

16 The record reflects that several of plaintiff's treatment
17 providers opined that she suffered from fibromyalgia. Dr. Buhl
18 first assessed plaintiff with "[m]ultiple myalgia" in March 2000.
19 Tr. 717. In 2002, Dr. Lee opined that plaintiff's complaints
20 were due to fibromyalgia, as opposed to the external
21 manifestations of ulcerative colitis, which "one would assume
22 . . . is now quiescent." Tr. 876. In a follow up evaluation,
23 Dr. Lee's associate, Dr. Daoud, found multiple tender points and
24 diagnosed fibromyalgia. Tr. 883, 888. Nurse Practitioner
25 O'Halloran also found multiple tender points and treated
26 plaintiff for fibromyalgia. Tr. 801, 855, 858, 863, 865. Then,
27 again, in 2003, Dr. Brody reported "positive trigger points
28 bilaterally throughout her body," and confirmed the diagnosis of

1 fibromyalgia. Tr. 856. In 2004, Dr. Conner again confirmed a
2 diagnosis of fibromyalgia. Tr. 862. I find this evidence
3 sufficient to establish a medically determinable condition.
4 Brenecke, 379 F.3d at 594.

5 The ALJ concluded that plaintiff's fibromyalgia was not a
6 medically determinable impairment. Tr. 26-27. However, the
7 record reflects evidence that plaintiff suffers from symptoms
8 characteristic of fibromyalgia. Tr. 715, 796, 801, 805, 807-08,
9 811-12, 855-56, 862-63, 869, 876, 883-84, 888. The ALJ's
10 decision that fibromyalgia has no more than a minimal effect on
11 plaintiff's ability to work is not supported by substantial
12 evidence. See Webb, 433 F.3d at 686 "[A]n ALJ may find that a
13 claimant lacks a medically severe impairment . . . only when
14 [t]his conclusion is clearly established by medical evidence."
15 Id. at 687.

16 (4) Plaintiff's Credibility

17 If the record contains no affirmative evidence of
18 malingering, the ALJ must provide clear and convincing reasons,
19 supported by substantial evidence, for rejecting plaintiff's
20 testimony. Dodrill v. Shalala, 12 F.3d 915 (9th Cir. 1993).
21 While an ALJ is not required to believe every allegation made by
22 a plaintiff, the ALJ may not reject a plaintiff's statements
23 simply because they are not fully supported by the medical
24 evidence. Fair v. Bowen, 885 F.2d 597 (9th Cir. 1989). Specific
25 findings are required to reject excess pain testimony. Id. The
26 ALJ must consider plaintiff's subjective pain allegations where
27 plaintiff produces objective medical evidence of an impairment
28 that is reasonably likely to cause the symptoms alleged.

1 Brunnell v. Sullivan, 947 F.2d 341, 345-46 (9th Cir. 1991)(en
2 banc). Where such evidence is produced, plaintiff's testimony
3 cannot be rejected "based solely on a lack of objective medical
4 evidence to fully corroborate the alleged severity of pain." Id.
5 at 345.

6 The ALJ relied on the consultative examination performed by
7 Dr. Mason on April 17, 2002, to reject plaintiff's testimony.
8 Tr. 622. Dr. Mason's note was pursuant to plaintiff's hospital
9 release notes following her C-section and tubal ligation surgery.
10 Tr. 622-23, 625-26. Dr. Mason's note does not provide
11 substantial evidence that plaintiff no longer suffers from the
12 effects of ulcerative colitis and fibromyalgia. The record,
13 however, indicates that plaintiff continued to suffer from
14 nausea, vomiting, and chronic diarrhea with up to 20 bowel
15 movements per day. Tr. 622, 820, 856, 866, 876, 895. The record
16 also indicates that plaintiff suffered from these symptoms
17 related to her fibromyalgia complaint. Tr. 715, 796, 801, 805,
18 807-08, 811-12, 855-56, 862-63, 869, 876, 883-84, 888.

19 The ALJ further rejected plaintiff's pain testimony because
20 Dr. Mason's note "revealed she was doing well in pain control
21 after her pregnancy, which was uneventful." Tr. 26, 622-23.
22 This note was made on the day of her C-section and tubal ligation
23 surgery. I find this note does not account for any pain
24 plaintiff might have suffered following her surgery. Further,
25 between 1996 and 2002, the record supports multiple visits to
26 doctors by plaintiff to treat her migraines, which were often
27 associated with pain, nausea, and vomiting. Tr. 715-16, 720,
28 728, 810, 866. Further, the record notes plaintiff's depression.

1 Tr. 99, 376, 728, 740, 837, 853, 856.

2 Finally, the ALJ rejects plaintiff's testimony based on
3 plaintiff's activities of daily living. Fibromyalgia is a
4 condition marked by chronic rather than acute pain. Brenecke,
5 379 F.3d at 590. "[T]he mere fact that a plaintiff has carried
6 on certain daily activities . . . does not in any way detract
7 from her credibility." Id. at 594. Plaintiff could drive and
8 take classes. Although she testified that she required
9 assistance to manager her children and household, and stated that
10 she can no longer drive due to her medications. Tr. 521, 894,
11 917, 921.

12 Moreover, I find that plaintiff established the existence
13 of severe impairments that could reasonably likely cause the
14 alleged symptoms. Bunnell, 947 F.2d at 345-46. Common symptoms
15 of fibromyalgia include "generalized pain and multiple painful
16 regions . . . Sleep disturbance, fatigue, and stiffness."
17 Jordan, 370 F.3d at 872. Plaintiff's records establish that she
18 suffers from these types of symptoms. Tr. 715, 796, 801, 805,
19 807-08, 811-12, 855-56, 862-63, 869, 876, 883-84, 888.
20 Therefore, I find that plaintiff presented objective medical
21 evidence of an impairment that is reasonably likely to cause the
22 symptoms she complained of. The ALJ failed to adequately
23 consider plaintiff's subjective pain allegations in light of this
24 fact. Bunnell, 947 F.2d at 345-46. I find no affirmative
25 evidence that plaintiff is malingering, and therefore find that
26 the ALJ failed to provide clear and convincing reasons, supported
27 by substantial evidence, for rejecting plaintiff's testimony.

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1 (5) Treating and examining physicians

2 The ALJ rejected the opinion of Dr. Daoud (a specialist in
3 the field of rheumatology) because "This doctor did not do any
4 control point testing[.]" Tr. 26. Even if contradicted by
5 another doctor, the opinion of a specialist, examining physician
6 can only be rejected for specific and legitimate reasons
7 supported by substantial evidence in the record. Lester, 81 F.3d
8 at 830-31. The ALJ's reasons for rejecting Dr. Daoud's opinion
9 were not legitimate, nor were they supported by substantial
10 evidence.

11 Further, Dr. Daoud's opinion was not contrary to other
12 medical opinions in the record. Dr. Mason, a gastroenterologist,
13 was the only physician to suggest that plaintiff's complaints
14 were the external manifestations of ulcerative colitis. Tr. 400.
15 In contrast, Drs. Brody, Lee, Daoud, Buhl, and Conner in addition
16 to Nurse Practitioner O'Halloran, each assessed plaintiff and
17 found her complaints the result of multiple myalgias. Tr. 715,
18 796, 801, 805, 807-08, 811-12, 855-56, 862-63, 869, 876, 883-84,
19 888. I find that Dr. Daoud's assessment and opinion were not
20 controverted by other medical opinion(s).

21 Further, the ALJ's requirement of "control point testing"
22 in order to diagnose fibromyalgia was error. Tr. 26. The Act
23 does not require control point testing. The Ninth Circuit
24 allows a physician's interpretation of subjective responses to
25 multiple tender points as sufficient to establish a medically
26 determinable condition. Benecke, 379 F.3d at 594.

27 Finally, the ALJ failed to address the fibromyalgia
28 diagnosis by the other treating physicians, including Dr. Buhl,

1 Dr. Brody, and Dr. Connor. Tr. 21-29. Even if this court
2 assumes that the ALJ correctly rejected Dr. Daoud's opinion
3 (which it does not) for that of the medical expert, nevertheless,
4 the ALJ failed to adequately dismiss the fibromyalgia diagnosis
5 by three other examining physicians.

6 **CONCLUSION**

7 For these reasons, the Commissioner's decision is not based
8 on substantial evidence, and is therefore, reversed and remanded
9 for payment of benefits.

10 IT IS SO ORDERED.

11 Dated this 18 day of December 2006.

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15 /s/ Ann Aiken

16 Ann Aiken
17 United States District Judge
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